F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]

(MURRAY-AYNSLEY, J.)

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J. (F.M.S.), McELWAINE, C.J. (S.S.) & TERRELL, J.A.

April 6, 1940.

WOON NGEE YEW AND OTHERS

(Appellants)

vs.

NG YOON THAI AND OTHERS

(Respondents).

[PERAK CIVIL APPEAL No. 1 of 1940]

Chinese Marriage—Divorce of secondary wife—Finding of fact—when Appellate Court may interfere with.

The plaintiff, Ng Yoon Thai, claimed to be the widow of Yap Swee deceased, being a t'sip or secondary wife. The defence alleged that she had been divorced during the lifetime of the deceased. The trial Judge found that there was evidence of a custom among the Chinese in the Federated Malay States that divorce at the will of the husband exists, but that it must be for proper cause and reasonable notoriety must be given to it. He held on the facts, however, that though there were existing grounds for the divorce, the deceased never in point of fact divorced the plaintiff. In so holding he rejected the evidence of the defence witnesses on the grounds that they were interested and vindictive.

On Appeal, **held** by McElwaine, C.J. (S.S.) and Terrell, J.A. (Poyser, C.J. dissenting):—

(1) that an Appellate Court should be very loath to differ on a finding of fact by a trial Court but that if the trial Judge can be shown to have misdirected himself on the evidence or to have rejected evidence for a wrong reason or to have drawn an inference from evidence which was equally capable of supporting a different inference, it may then be the duty of an Appellate Court to interfere.

(2) that in this case, there was sufficient evidence that the deceased divorced his wife according to Chinese custom, when he refused to return to her, and that he informed various friends and relations that he had done so; and therefore there was sufficient evidence to constitute a divorce of a secondary wife according to the custom among Chinese as recognised in Perak.

Cases referred to:—

(1) *Boase v. Cluny Rubber Estates Ltd.*, 2 F.M.S.L.R. 130.

(2) *Brook v. Brook*, 9 H.L.C. 193.

(3) *Chulas and Kachee v. Kolson binte Syedoo Malim*, Leicester 462.

(4) *In re Lee Choon Guan*, (1935) 4 M.L.J. 79; (1935) S.S.L.R. 166.

(5) *In re the Estate of Jacob Manasseh Meyer deceased*, M.L.J. 1938 S.S.L.R. 112.

(6) *The Motor Emporium v. Arumugam*, (1933) 2 M.L.J. 276; (1933-4) F.M.S.L.R. 21.

(7) *In re Paine*, (1940) 1 Ch. 46.

(8) *Piper v. Chappel*, 14 M. & W. 624.

(9) *Powell and wife v. Streatham Manor Nursing Home*, (1935) A.C. 243.

(10) *Regina v. Willans*, 3 Kyshe 16.

(11) *In re Sim Siew Guan deceased*, (1932) 1 M.L.J. 95; (1933) S.S.L.R. 539.

(12) *Sottomayor v. De Barros*, 3 P.P. 1.

(13) *Yap Kon Keow v. Low Hup Neo*, 6 F.M.S. L.R. 13.

(14) *Yap Tham Thai v. Low Hup Neo*, 1 F.M.S.L.R. 383.

H. Y. Teh and *H. S. Ong* for plaintiff.

H. D. Mundell and *H. R. Rix* for defendants, other than the first and fifth defendants.

Murray-Aynsley, J.—In this case the plaintiff claims to be the widow of one Yap Swee. Up to a point the facts are clear. She was for some years admittedly a t'sip of the deceased and bore two children, a boy and a girl, by him. In March, 1936, she left the house of the deceased in Menglembu and did not return. It is alleged by the defendants that thereafter all relations were broken off and that the plaintiff was divorced. The plaintiff on the other hand, avers that relations continued until the end of the life of the deceased. The principal issue is thus whether the plaintiff was divorced.

To decide this it is necessary to consider—

(a) whether according to Chinese custom as applied in the Federated Malay States divorce is possible;

(b) what form does such a divorce take, and

(c) did in point of fact a divorce take place according to such form.

If any divorce took place it must obviously have been in a non-judicial form as no divorce was granted or could have been granted by any Court in the Federated Malay States.

It was admitted by both sides for the purposes of this case that the deceased was domiciled in Perak.

In the first instance consideration must be given to the question as to the extent to which Chinese custom has the force of law in the Federated Malay States. For a considerable period the Perak Order in Council No. 23 of 1893 gave statutory effect to certain Chinese customs or alleged customs therein set out.

No similar provision was made for the other States, but in the absence of any written law effect was given to part of this Order in Council in other States. In the case of *Yam Tham Thai v. Low Hup Neo*[14] an explanation is given of the attitude of the Courts. See also *Yap Kon Keow v. Low Hup Neo*[13].

During the period 1899–1932 the Secretary for Chinese Affairs Enactment gave that officer jurisdiction to deal with cases of a domestic nature according to Chinese custom.

Both these have been repealed and nothing has been substituted.

In dealing with Chinese custom, there is no question of dealing with a body of law such as Hindu or Mohammedan Law nor is there anything so definite as the custom of a manor. It is more in the nature of a trade custom, the recognition of the habits of a particular body of people in dealing with particular matters. Where it can be shown that the Chinese follow settled practices the Courts will give effect to those practices where no provision is made in local legislation, so far as these practices are of a character, not being contrary to reason or natural justice, to which effect can be given with propriety.

Until recently no system of law had been applied in the Federated Malay States except so far as Mohammedan Law might be applicable. Enactment 3 of 1937, however, made English Common Law applicable "so far as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render necessary".

I think it is clear that the question of marriage is one in which the English Common Law is inapplicable (otherwise no one who did not believe in the Apostolic Succession could get married at all), and therefore if this matter is regulated at all, it must in the case of the Chinese population be regulated by custom.

In order to ascertain Chinese custom, there are a few decisions in cases in the Federated Malay States and in the Colony. Apart from this it is a question of fact to be proved by the evidence of witnesses. There are also certain books which have been cited in this and other cases and which have acquired a certain degree of recognition.

In addition to the custom of the Chinese, there has been in China a body of written law. This was known as the *Ta Ching Lu Li*. Certain parts of it are given in translation in the work by Jamieson which was cited before me. In the form of Staunton's translation it was also cited with approval in the case known as the Six Widows' Case.

This part is in a form purely penal and so not directly applicable here. It will be seen that it is not a Code. It is merely a series of prohibitions in connection with matters which are primarily regulated otherwise, that is by custom.

Section 116 reproduced in Jamieson deals with divorce. I gather that it only refers to t'sais. In the Six Widows' Case at page 187 Hyndman Jones, C.J., quoted Staunton as saying that the penalties applied also in the case of a t'sip subject to a reduction in amount. I have not been able to verify this. It is not confirmed by the extracts given in Jamieson; there the reduced penalties in the case of a t'sip do not occur in the section dealing with divorce.

However, from the section on divorce one can deduce:—

(a) that divorce exists,

(b) that it is at the will of the husband without the intervention of any Court,

(c) it should be only on account of one of several recognised causes.

But it should be noted that for the lesser grounds divorce could not be given if the husband was in mourning. This shows that it was regarded as a serious and important matter.

Incidentally it looks as though the position was the same as prevailed in Roman Law, viz., that a divorce for an insufficient cause was valid but constituted a criminal offence. In fact the position of divorce in China as well as marriage seems to have resembled that in the Roman Empire before the changes that followed the introduction of Christianity. Both marriage and divorce seem to have been regarded primarily as private matters, only coming within the jurisdiction of the Courts or under the notice of the Government in case

of abuse. We have become so used to a different conception that the Courts in England (in the case of *Rex v. The Hammersmith Registrar*) were considerably troubled by a Mohammedan divorce.

The well known books of Gray and Dyer Ball which have often been cited bear out this in general outline. Unfortunately neither of the writers was a lawyer and neither wrote from a legal point of view.

As I said before the plaintiff was a t'sip of the deceased. That is a term which is incapable of translation but has reference to a relationship of a marital character which is peculiar to the Chinese. In cases from the Colony the status of a t'sip has been clarified to a certain extent. The Six Widows' Case decided that a t'sip is a wife within the meaning of the Statutes of Distributions, that is, in the position of a t'sai. In this case and the two Privy Council cases of 1920 and 1930 reference was made to the question of divorce but it was in no way germane to the issues decided, and those cases cannot be considered to have decided anything in the matter.

But whatever the position as regards divorce may have been in China it by no means follows that the custom of China as it existed under the Manchu dynasty is suitable for the Chinese population of Perak to-day. Since the Six Widows' Case the position of the t'sip has improved considerably not only legally but socially. As an instance of this it may be noted that it is now usual for each t'sip to have a separate house, a thing which I should imagine to have been quite unthought of in China in the days of the "ancien régime".

I think that the effect of the previous law and custom of China is this; if the authorities had shown that divorce did not exist in China, then I think that Courts here would be reluctant to admit that such a custom had originated in Malaya. But when it has been shown that divorce existed in China, then the Courts will only require slight evidence that the custom has continued.

On the other hand I consider that the method and causes for divorce may well have changed here. The procedure in China may be inapplicable here. In a somewhat similar matter, the old ceremonies of marriage are almost obsolete here. But, I think, allowance must be made for change in custom. It would be absurd to suppose that to-day no Chinese lady could become a t'sai without being carried in a red chair, but a generation back it would have been considered an essential part of the ceremony. So also, I think, procedure in divorce is capable of changing.

I should add that divorce by mutual consent is on a different footing and I do not deal with that at all.

As to the customs prevailing in Malaya in this matter, there are two local cases. *In re Sim Siew Guan deceased*[11] and *re Lee Choon Guan deceased*[4]. In only the first of these was the question of divorce necessary for the decision of the case and it was only in this case that any evidence as to custom was given. This was given by a gentleman who was Consul-General for China in Singapore.

As summarised by Shaw, C.J., his evidence came to this—

> "that divorce was recognised, that it was at the will of the husband, who was entitled to divorce his wife if she were disobedient to himself or his principal wife, if she did not conform to the household regulations, or was guilty of immoral conduct. The custom was that the husband should notify the dissolution either to his near relations or to his clansmen. It appeared that the dissolution was something like the inception of the union, that no actual ceremony was needed, and it depended upon the actual intention or notoriety given to the union or dissolution".

In the present case I had the advantage of hearing the evidence of Mr. Lee Swee Ho, a gentleman who occupies a prominent position among the Chinese of Perak. The material part of his evidence is—

> "that divorce was practised by Cantonese and Hakkas in the case of t'sips—that the usual cause was mis-conduct. There was no question as to the right. He knew a case about 12 years ago and another eight years ago, in both well known men. If a t'sip leaves her husband's house he has a right to divorce. If she goes away and refuses to come back he has a right to divorce her. Once divorced she has no claim to maintenance or share in estate.
>
> Form of divorce, the husband tells friends and relatives. In China I think they tell in ancestral temple. It is considered to be effective when friends informed. I have heard of divorce where a t'sip has borne a son to the husband.
>
> In Perak formalities and grounds for a secondary wife the same as for a principal wife. The relatives of wife do not have to be considered in cases of misconduct, no need to consider the relatives of the wife, if wife refuses to come back or wants a separate establishment wife's relatives should be consulted. After birth of a son, divorce a serious thing to family. A declaration is necessary for a divorce—friends and relatives. No particular form, husband would make a round of visits.
>
> In the two cases here of divorce, one was for adultery, the other for failure to return to the house; whether adultery has been committed depends on opinion of husband.
>
> The wife's family is the only check on divorce on other grounds. Divorce very rare—husband loses face if he divorces wife.
>
> Passage in Dyer Ball p. 212–3—it used to be so under Manchu dynasty. It would not be necessary to make a special visit to inform friends of divorce".

I take the gist of this to be that divorce must be for cause and reasonable notoriety must be given to it. According to this gentleman a t'sai and a t'sip are for purposes of divorce in the same position.

Taking all this together I am of opinion that there is evidence of a custom of reasonable certainty and of a not unreasonable character, provided it is limited in the way that the witnesses have said. It is true that it cannot be described as a satisfactory solution of the problem but until the legislature makes provision in the matter I consider that such a custom is probably better than none.

The evidence also shews a form of procedure to be adopted.

There is however a passage in the 1930 case before the Privy Council to which, in my opinion, consideration should be given. The judgment quotes with approval the evidence of a Mr. Beatty who gave evidence as to Chinese custom and stated that a t'sip who had borne a son could not be put away. This opinion put in such an unqualified way does not seem to find support from the other authorities. I think it only means that a t'sip who had borne a son could not be put away without cause. Even if it meant in any event the opinion which was used by way of argument cannot be taken to make law for the people of Malaya any more than the erroneous opinion expressed in the 1920 case that recognition of a son as legitimate implied recognition of the mother as a wife, an opinion which was repudiated in the latter case before the same tribunal.

It is necessary to apply these conclusions to the facts of the present case. The first fact of importance is that in March, 1936, the plaintiff with her children left the house of the deceased and went to the house of her aunt in Ipoh. Afterwards the plaintiff made a complaint to the Protector of Chinese; the husband made a report at the Police Station. These with the notes of the subsequent proceedings before the Protector of Chinese speak for themselves and show what the relations between the pair were at that time. It is common ground that the plaintiff never returned to Menglembu. It is clear that from Ipoh she went to Kampar where she lived at two addresses, the last few years in fairly squalid circumstances in an attap house rented at $2.00 a month.

In 1938 the deceased took proceedings before the Protector of Chinese relative to two girls whom the plaintiff had taken with her, one his own, the other adopted. Of course, the allegations of the deceased are not evidence of anything, a man of the type of the deceased would be likely to make charges recklessly and vindictively, but his statement to the Protector of Chinese and that of the plaintiff do I think show very clearly what the relations between the parties at that time were. It is also clear that at that time and presumably for some time before the deceased was not maintaining the plaintiff. There is one other certain fact in the period after the plaintiff left Menglembu, viz., in June, 1937, she gave birth to a female child in Kampar. She says that the deceased was the father. In view of the facts that are clear about the relations between the parties after the plaintiff left Menglembu, I do not think that this is at all probable. I may add that I found the plaintiff quite valueless as a witness. I think therefore that before his death the deceased had according to custom two good grounds for divorce. It is true that the plaintiff had some reason for leaving Menglembu. But I do not think that according to Chinese custom that would make any difference.

But though the deceased may have had grounds for divorcing the plaintiff it does not follow that he did.

We have now to consider what the positive evidence is that the deceased ever divorced the plaintiff.

In the first case there is the evidence of the wives. I do not think that any reliance can be placed on this. They are interested and they are obviously vindictive. Further if one examines the original defence and the amended defence one sees that as far as they are concerned any question of an express declaration by the deceased is an after-thought, the last applies to the evidence of Loh Mook Lin father and committee of one of the defendants.

The remaining evidence is—

(1) An alleged statement to one Wong Fatt, a Chinese detective, employed by the deceased. Unfortunately the plaintiff was not asked about this. I do not doubt that she would have denied it. I do not consider this satisfactory evidence.

(2) The statement made by the deceased to the Protector of Chinese in 1938. This may be explained by the fact that as he was accusing the plaintiff of prostitution he would be reluctant to admit that she was his wife. Against this we have the fact that during her residence in Kampar he still referred to the plaintiff as his wife when speaking to the two detectives.

(3) The evidence of Eu Kam which amounts to this; Eu Kam asked the deceased about the plaintiff and was told that he (deceased) had severed relations with the plaintiff "not long after she ran away". In cross-examination the witness said that the deceased said "he did not want her". "That is what I took to mean divorce".

I think that the notification to friends, relatives or clansmen, which were stated to in the evidence given both in Singapore and here to be the essential part of the procedure in divorce means more than a statement made to one person, who might be described as a friend, in answer to a question, and of a distinctly ambiguous character.

Taking all this I am not satisfied that the deceased in point of fact ever divorced the plaintiff. When it is remembered that divorce is a rare thing among Chinese in Perak it will be obvious that there must be many cases of t'sips running away where the husband does not proceed to divorce them. Until the passing of the Distribution Enactment there was no special reason for doing so, and to do so entailed loss of face and publicity, about a matter in regard to which husbands everywhere are notoriously sensitive.

I think that the plaintiff succeeds on the principal issue. Whether any further relief should be given I will consider later.

Costs of both sides out of estate. (Solicitor and client). Further consideration adjourned.

On Appeal:

H. D. Mundell and *H. R. Rix* for appellants.

W. G. W. Hastings and *H. Y. Teh* for respondents.

Poyser, C.J.—The plaintiff claimed to be a widow of Yap Swee who died on the 26th of February, 1939. The learned trial Judge found that she was, and this appeal is against such finding.

The plaintiff was for some years a t'sip of the deceased, and bore him two children. In March, 1936, she left him and never returned. The point for decision in this case was whether the deceased did or did not divorce the plaintiff after she left him. No question of law arises on the appeal; in the lower Court the question of whether and under what circumstances the deceased could divorce the plaintiff was argued at length. The trial Judge's findings which are accepted by the appellants are as follows:

(1) that a China-man who left China, as the deceased did, before the foundation of the Republic and was domiciled in the State of Perak, as he was admitted to be, may divorce a t'sip;

(2) that such divorce is at the will of the husband and without the intervention of any Court;

(3) that such divorce should only be on account of one of several recognised causes.

It was agreed in this case that the plaintiff did, according to Chinese custom, give the deceased cause to divorce her, and the only question was whether he did in fact do so.

Mr. Lee Swee Ho, who occupies a prominent place among the Perak Chinese, gave evidence as to the method of divorce. This evidence was accepted by the trial Judge, and was to this effect:

> In Perak the formalities and grounds for divorce of a secondary wife are the same as for a principal wife, but divorce is very rare; the husband loses face if he divorces a wife. To effect the divorce the husband informs his friends and relations; there is no particular form of declaration; he would make a round of visits.

The trial Judge, accurately in my opinion, sums up his evidence in this way:

> "I take the gist of this to be that divorce must be for cause, and reasonable notoriety must be given to it".

The evidence that the deceased did divorce his wife was as follows: The 2nd, 3rd, 4th and 6th defendants (widows of the deceased) and Loh Mook Lim (the father of another widow) gave evidence to the effect that the plaintiff had been divorced. The trial Judge, however, did not consider that any reliance could be placed on their evidence, and rejected it.

The witness Wong Fatt, a detective, was employed by the deceased to watch the plaintiff in case she earned money by prostitution. He stated that the plaintiff said she had been divorced, but the deceased did not say he had divorced her. Other evidence relied on by the defendants were statements made by the deceased that he had severed relations with the plaintiff.

The trial Judge, taking the evidence as a whole, was not satisfied that the deceased in point of fact ever divorced his wife. He pointed out that though the deceased may have had grounds for divorcing his wife it does not follow that he had done so, and that there was no evidence of the notification to friends, relations and clansmen, which was an essential part of the proceedings. I think the trial Judge came to a correct conclusion, and I would add to the reasons stated by him for coming to such conclusion, that it appears remarkable that if the deceased had divorced his wife he mentioned nothing about such divorce to the Protector of Chinese in 1938, when he claimed the return of the four children in the custody of the plaintiff. He did not then say a word about having divorced the plaintiff, but merely that the plaintiff had left him and that he agreed to a separation.

I do not see how this Court can properly dissent from the trial Judge's findings of fact; to do so would in effect be to accept evidence which the trial Judge had specifically rejected, thereby ignoring the judgment in *Powell and Wife v. Streatham Manor Nursing Home*[9], and various Privy Council cases.

I would dismiss the appeal with costs.

McElwaine, C.J. (S.S.)—The late Yap Swee took the plaintiff Ng Yoon Thai as a t'sip at some uncertain date not earlier than 1932.

The Perak Order in Council No. 23 of 1893 declared certain laws of the Empire of China to be in force in the State of Perak.

The Order set out these laws: the only ones which are material are:

(iv) A China-man may espouse as many inferior wives as he pleases, provided he supports them in a befitting manner;

(xvii) An inferior wife is not entitled to any share in the estate.

This Order in Council was repealed on the 1st January, 1930, when the Distribution Enactment 1929 came into force. We were referred to no law in force at the date on which the plaintiff became a t'sip which empowered Yap Swee to take secondary wives but Yap Swee was resident in Perak while the Order in Council was in force and it was not argued that the repeal of the Order affected the personal law attaching to Yap Swee.

Section 8 of the Distribution Enactment (Cap. 71) provides that "If any person so dying intestate be permitted by his personal law a plurality of wives", the surviving wives share equally the shares which a sole surviving wife would have taken.

As this Enactment does not apply to any person professing the Mohammedan religion I think it clearly contemplates Chinese having a plurality of wives if their personal law allows it.

Whatever the personal law of Chinese domiciled in China may have been under the Empire, I think that these people have been monogamous under the law of China since 5th May, 1931, and if the law of the domicile is the test of what the personal law is, Yap Swee, being domiciled in China, was probably by the law of his domicile monogamous at the time when he took the plaintiff as a t'sip.

In so far as the Six Widows' Case was based on the Colony Charter of 1855 it can have no force in the State of Perak to which that Charter did not extend. In so far as the Six Widows' Case is based on comity it may well apply in Perak. But by comity I understand that the Perak Court will recognize the law of the domicile which is in this case the law of China and I should require argument to convince me that any portion of the Perak community can develop a custom like a trade custom which affects status and nationality if that custom is not recognized as law in the Courts of the domicile, or that if the law of China now enjoins monogamy a China-man domiciled in China can come to Malaya and claim a right to have six wives just because such a claim has been recognized in the case of Chinese domiciled here, or domiciled in China in the days of the Chinese Empire. If a Chinese national domiciled in China and lawfully married comes to reside in Malaya and takes to himself a t'sip, will the Chinese Courts now recognize the t'sip as a wife?

If the principles of *Brook v. Brook*[2] or *Sottomayor v. de Barros*[12]; *In re Paine*[7] accord with the law of China, I doubt if a union, at any rate if contracted since 5th May, 1931, would be recognized or if the Chinese Court would recognize the t'sip as a wife; but having regard to Article 992 of the Chinese Family Code she possibly might be so regarded if the Court has not annulled the second "marriage".

In his historic judgment in *Regina v. Willans*[10] at p. 33 Maxwell, R., said:

> "In this place, where the law of England has been for the first time brought to bear upon races among whom polygamy has been established from the remotest antiquity, the Court has had to consider the question, and has always held polygamous marriages valid. Whether the local Judicature erred, or not, in coming to this decision, I do not stop to consider. It is enough to say that if it decided rightly, it is not because our Charter demands an exceptionally indulgent treatment of the question, but simply because the principle which makes the validity of a marriage to depend upon the religions of the parties, extends to polygamous marriages; while if the Court has been wrong, it has erred, not in adopting a principle foreign to, and at variance with the law of England, but in stretching, beyond its legitimate limits, a perfectly well established one".

This remark certainly applies to Mohammedan marriages and probably to the marriages of other people with their own Code of laws such as the Jews. When those laws go beyond mere local customs they are recognized, but when a local custom grows up which is not based on the religions of the people I think it doubtful whether that custom attaches to a national of a civilised country domiciled in that country whose law forbids it, merely by reason of his sojourning in a country where the custom is recognized as applying to its own domiciled nationals.

In *Chulas and Kachee v. Kolson binte Seydoo Malim*[3] Maxwell, R., said:

> "Where our law is wholly unsuited to the condition of the alien races living under it, their own laws or usages must be applied to them on the same principles and with the same limitations, as foreign law is applied by our Courts to foreigners and foreign transactions. They must be regarded as persons having foreign domiciles, and governed for many purposes by this law, and as if they were residing among us temporarily".

That, I think, is the principle. We recognize the custom of races indigenous to the country. If they are persons having foreign domiciles we regard them as governed by the law of their domicile in such matters as capacity to marry.

I make these remarks by way of caution, not by way of decision.

This interesting problem does not fall to be decided in this case because it has not been argued before this Court nor has the kindred problem whether a China-man of Chinese domicile can now by his own sole act dissolve his marriage and the case has been argued on the basis that the plaintiff was a secondary wife entitled to a share in Yap Swee's estate under the Distribution Enactment if she was still his wife at the date of his death and the only question is, had Yap Swee divorced her? I think there is no doubt that before and since 5th May, 1931, a China-man could divorce his wife for various reasons. It appears that under the modern law he can divorce her for desertion or for adultery among other reasons. (Van der Valk's Outline of Modern Chinese Family Law p. 114, 117). In China formality and publicity seem now to attend a divorce other than one by mutual consent and it is pronounced by the Court.

The Courts of Malaya have no jurisdiction to dissolve marriages of this kind but the evidence shews that divorce can be effected by the husband, under the custom of the domiciled Chinese and I should doubt whether these people distinguish between domicile and residence.

Mr. Lee Swee Ho, a Justice of the Peace and a member of the Chinese Advisory Board of fifteen years standing, gave evidence that in Perak it is customary to divorce a t'sip for mis-conduct, and if she leaves her husband's house he may divorce her. He knew of divorce after the t'sip had borne a son.

The following portions of Mr. Lee Swee Ho's evidence are important:

> "Form of divorce—tell friends and relatives. In China I think they tell in ancestral temples. It is considered to be effective when friends are informed.
>
> Duties of t'sip at husband's funeral, to wear mourning and attend funeral. If she does not she is not recognized. If wife ill she would mourn in house. Relatives of wives do not have to be consulted in cases of mis-conduct.
>
> A declaration is necessary to a divorce. Friends and relatives (are told), no particular form. It would not be necessary to make a special visit to inform friends of divorce".

I agree with Terrell, J., that in determining questions of Chinese custom in Malaya it is permissible to look at findings of other Supreme Courts in Malaya but, of course, special weight must be given to evidence indicating that some particular custom differs in different parts of the peninsula.

From the evidence of Mr. Lee Swee Ho and the finding of Shaw, C.J., in *In re Sim Siew Guan*[11] and of Terrell, J., in *In re Lee Choon Guan*[4] I gather that the principal points about a divorce are that there must be an intention to divorce and that it must not be kept secret—it must be published, and it appears to me that telling friends and relatives is just as much evidence that a divorce has taken place as it is a method of divorcing.

The learned trial Judge was of opinion that Yap Swee had two good grounds for divorcing the plaintiff and I think the evidence clearly shewed that he had. The learned Judge also found the plaintiff quite valueless as a witness but having examined the evidence he concluded "I am not satisfied that the deceased (Yap Swee) in point of fact ever divorced the plaintiff".

An appellate Court should be very loath to differ on a finding of fact by a Court which has seen and heard the witnesses but if the learned Judge can be shewn to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason or to have drawn an inference from evidence which was equally capable of supporting a different inference it may be the duty of an appellate Court to interfere.

The learned Judge found, and he was justified by the evidence in finding that the plaintiff (respondent) left her husband's house in March, 1936, and that she never returned to her husband; that she was not maintained by Yap Swee and that she lived in fairly squalid circumstances in an attap house rented at $2.00 per month.

He could place no reliance on the evidence of the wives to the effect that Yap Swee had told them he had divorced the respondent because they were interested and obviously vindictive, and because in their original defences they alleged that the desertion of the deceased by the respondent amounted to a divorce while in their

amended defences they said that the deceased gave out that he no longer would have anything to do with her and that this amounted to a divorce according to Chinese custom.

Now, if a witness is interested or vindictive, these are grounds for scrutinising their evidence closely but they are not grounds upon which the evidence should necessarily be disbelieved. That point of view was abolished in 1843 and is negatived by section 120 of the Evidence Enactment. The only evidence contradicting these women is that of the respondent whom the Judge did not believe.

The learned Judge thought the amended defence an afterthought. The defences were drawn by lawyers. The so-called amended defences were filed after the plaintiff had amended her statement of claim and it is possible that in the two and a half months which elapsed between the two defences it was discovered that desertion while a ground for divorce, does not in itself constitute a divorce and that more than mere desertion must be proved and pleaded.

Of course, a Judge is entitled to reject uncontradicted evidence if he considers it to be untrue but I do not find the reasons for rejecting the testimony of these witnesses very convincing.

The Judge's reason for rejecting the evidence of Loh Mook Lim is that his defence that the respondent had deserted the deceased and had committed adultery and that the deceased gave out that he would have nothing to do with her and that this amounted to a divorce, was an afterthought. Loh Mook Lim is the father and committee of the fifth defendant who is insane and so far as the record shews neither Loh Mook Lim nor the 5th defendant filed any previous defence in this suit, so whatever comment may be justified by a comparison of the two defences filed by each of the 2nd, 3rd, 4th and 6th defendants is not justified in the case of Loh Mook Lim. Now, Loh Mook Lim swore that Yap Swee has told him that he had divorced the respondent. This witness had suggested to Yap Swee that since he wanted the children of the respondent he ought to take the respondent back whereupon Yap Swee spat at him and said "once a wife has gone away and (been) taken by some one else it is bad to take her back, if one does take her back it would be bad luck". This witness does not appear to be vindictive or interested and the Judge does not say he is and the sole reason for rejecting his testimony is a misapprehension on the part of the learned Judge that he had filed inconsistent defences which he had not. The Judge misdirected himself as to this man's evidence.

Wong Fatt swore that the respondent had told him she was divorced. This witness does not appear to have exaggerated his evidence because he says that Yap Swee did not tell him he had divorced the respondent, a detail which one would expect Wong Fatt to add if he had a disregard for truth. His evidence was not contradicted by the respondent who did not give evidence until all the defence witnesses had given evidence (the onus of proving the divorce being on the defence). The only reason given for rejecting Wong Fatt's evidence is because the plaintiff was not questioned about it. It was the duty of the counsel for the plaintiff, not of the defence, to question the plaintiff about evidence already given. It is for this reason, namely, that the defendants' counsel was not so unwise as to cross-examine the plaintiff with a view to contradicting the defence evidence which had already been given that the Judge regarded this witness as unsatisfactory.

He says he has no doubt that if the plaintiff had been questioned on this alleged statement that she would have denied it, but he had already said that he found the plaintiff quite valueless as a witness.

To the Protector of Chinese Yap Swee said on the 3rd June, 1938, that the plaintiff *was* his wife until she left in March, 1936, indicating that she was not his wife in June, 1938.

The learned Judge sets off against this, the evidence of Wong Fatt that some time before July, 1937, Yap Swee had asked him if he knew his wife Ng Thai and the evidence of Lai Chong that in 1936 or 1937 he had asked a similar question. Even if the word "wife" was any more than a bare description of a woman who might be better known as a wife of Yap Swee than by her own name, this word "wife" was used almost a year before the statement to the Protector and consequently does not weaken that statement so far as it indicates that in 1938 she was not his wife.

Yon Kam in cross-examination said "He said he did not want her; that is what I took to mean divorce". But he also used stronger language and said that Yap Swee "had severed relations". Unfortunately, he was not asked what Chinese word was used.

There is no evidence that Yap Swee had any relations in Perak whom he could tell that he had divorced the respondent, but evidence was called to shew that he had told friends and acquaintances. Much

of the evidence has been discredited by the Judge for mistaken reasons and that evidence is corroborated by the conduct of the parties as found by the learned Judge, that the respondent never returned to Yap Swee, that he did not maintain her and that she was cohabiting with some one else.

As I have already indicated, I have considerable doubt as to whether a China-man of Chinese domicile can validly contract a second marriage during the continuance of the first or whether he can dissolve his marriage without the intervention of the Courts of his domicile, but as neither of these points was argued, and as they are questions of foreign law and therefore questions of fact which should be proved, I cannot express any final opinion upon either and I base my decision solely on the facts upon which it was argued, making it clear that this judgment is no authority for the proposition that a China-man of Chinese domicile can now legally contract of polygamous marriage even in Malaya or that such a China-man can dissolve his marriage without either the consent of his wife or the intervention of the Courts of the domicile. Both those questions have been assumed to be answerable in the affirmative but they may one day arise for decision.

For the reasons I have given based solely on the question of fact "did Yap Swee purport to divorce Ng Yoon Thai?" I would allow this appeal.

Terrell, J.A.—Two principal questions are involved in this appeal:

(1) what is the custom as to divorce which should be recognized in Perak? and

(2) does the evidence establish that the plaintiff (respondent) was in fact divorced?

As regards (1), both counsel and the learned trial Judge referred to evidence of the customs as given in reported cases in the Colony, and the learned Judge addresses himself to the enquiry as to what is the custom prevailing in Malaya.

There is, however, a difference between the Colony and the Federated Malay States in matters relating to Chinese custom, in the basis on which the law generally is administered in the two jurisdictions. In the Colony the early settlers were deemed to have brought with them the Common Law of England and all that it implied. Then there were the three Charters of Justice in 1807, 1826 and 1855, and these specifically provided that the administration of justice was to be adapted so far as circumstances would permit to the religious manners and customs of the several classes of litigants. As a result either of the principle of comity introduced by the Common Law, or as a result of the Charters, the English rules of law have been modified in the case of persons of alien race and custom (see *In re the Estate of Jacob Manasseh Meyer deceased*[5]. In the Federated Malay States there are no Charters of Justice, and the Common Law was not introduced until the passing of the Civil Law Enactment No. 3 of 1937. In the present case there is no difficulty so far as matters in dispute arose after March 1937, when with certain reservations, the English Common Law was introduced, and the Courts can now act on the wide principle laid down by Sir Peter Maxwell in *Regina v. Willans*[10] where he says at page 32:

> "But where the law of the place is inapplicable to the parties by reason of peculiarities of religious opinion and usages, then from a sort of moral necessity the validity of the marriage depends on whether it was performed according to the rites of their religion".

The same principle must I think also be applied to questions of divorce.

Although in my opinion the passing of the Civil Law Enactment gives ample justification for the adoption of principles which have always been followed when English law is administered, I think that the same principles would have been followed in matters of Chinese custom in the Federated Malay States if the Enactment had never been passed. It can hardly be suggested that between the repeal in 1929 of the Perak Order in Council (Recognition of Chinese Customs) and the passing of the Civil Law Enactment in 1937, there were no Chinese customs to which the Courts would give recognition. As I said in 1933 in the case of *The Motor Emporium v. Arumugam*[6] at page 278:

> "Under section 49 (i) of the Courts Enactment the Supreme Court has the widest possible jurisdiction in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised every Court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object and for giving decisions which are in conformity with the social conditions of the community where the law is administered".

Again in an earlier case, *Boase v. Cluny Rubber Estates Ltd.*[1] Edmonds, J.C. adopted certain English equitable rules which can only be justified on the principle of "moral necessity" relied on by Maxwell, C.J., in the passage quoted above.

Although, therefore, the recognition of Chinese customs may possibly rest on different grounds in the Colony and the Federated Malay States, I do not think

that there is any difference in the extent of such recognition, and the Courts in both jurisdictions will act upon the same principles.

The question arises whether for the purpose of ascertaining the custom of Chinese in Perak it is permissible to rely on evidence of such custom given before Courts of Record in other parts of the peninsula. It is well established that a Court of Record in England will never take judicial notice of a foreign custom or of foreign law, but will require the custom or the law to be established in each case. It appears to me that the proof of the custom of marriage or divorce among the Chinese in Malaya is on a rather different basis. The customs of the Chinese in Malaya are not based on those of Republican China, and accordingly no question of proving a foreign custom arises. The present customs are no doubt derived from the customs prevailing in the time of the Manchus, but have been adopted in Malaya with considerable modifications, particularly with regard to the status of a secondary wife or t'sip. The customs of Imperial China have accordingly a certain historical interest but nothing more.

Generally speaking a Court of Record only takes judicial notice of a custom that has been proved before such Court, and in 1845 the Court of Exchequer refused to take judicial notice of an alleged custom in the City of London that had not been so proved [see *Piper v. Chappell*[8]].

I do not think that such a strict rule should be observed as between the High Courts of Malaya in connection with the proof of Chinese customs. It is true that the Courts of the Colony and the Federated Malay States are distinct, but the fact remains that the same Judges sit in both jurisdictions, that the Courts of Appeal in both the Federated Malay States and the Colony are composed of the same members, and that there is no reason whatever to suppose that the customs of the Chinese differ in different parts of Malaya. There are many reported cases in which the decisions on the questions of Chinese customs in one jurisdiction have been cited in the other, and I cannot think that, when a Judge who has had expert evidence given before him on such a question in the Colony, crosses the border, and has to try a similar question in the Federated Malay States, justice requires him to shut his eyes, and forget that the same subject has been fully investigated in the Colony. I do not say that there may not be cases in which custom as recognized in the Federated Malay States may not be at variance with the custom as recognized in the Colony, and in such cases it must be open to the parties to bring evidence of such variation. That, however, is not the position in the case now before the Court, and as the customs are in the main uniform throughout Malaya, it appears to me that a consideration of the customs as regards marriage and divorce which have been established in the Colony are relevant in considering a similar question in the Federated Malay States.

The two reported cases to which the learned trial Judge refers are: *In re Sim Siew Guan deceased*[11] and *In re Lee Choon Guan deceased*[4]. The first was a decision of Chief Justice Sir Walter Shaw, who recorded the evidence of Mr. Tsing Ju-Ching, the acting Consul-General for China. The other case was decided by myself. It involved a claim by an alleged widow of Lee Pang Seng, one of the sons of Lee Choon Guan deceased. The decision was that the claimant had never been married to Lee Pang Seng, or that, if she had been married, she had been divorced prior to his death. I do not think that the alternative finding must necessarily be regarded as *obiter*. The learned trial Judge is mistaken in saying that only in the case before Sir Walter Shaw was any evidence of custom given. In the case before me such evidence was given by Dr. Tyau, the Consul-General for China at the time. Dr. Tyau was a graduate of Cambridge University and a barrister-at-law of the Middle Temple. He was a doctor of Chinese Law and claimed to be acquainted with question of Chinese marriage and inheritance. Mr. Lim Swee Ho's evidence is in all main essentials entirely in accordance with the evidence given by the two experts in the Singapore cases and serves to establish that a custom on the question of divorce is well recognized, and, as the learned trial Judge has said, the custom being of reasonable certainty and not being unreasonable in character is one to which the Courts should give effect.

It is useless to approach a question of this kind from the point of view of Western civilisation, where originally every Christian marriage was a Sacrament, and where the union either could not be severed at all, or only by the civil law encroaching on the ecclesiastical law, and allowing a divorce in certain limited cases. Even then the procedure was, and still is, hedged about by various formalities which make a dissolution of marriage a far more difficult, costly and lengthy process than its original institution.

The conception of the marriage bond among the Chinese so far as concerns secondary wives, or t'sips, was something very different. In Imperial China a t'sip had practically no status. According to Dyer

Ball, Things Chinese, page 213, she could be dismissed and left destitute. Her position was a little better if she had borne a son, as then apparently she could not be divorced without cause. These, however, are matters of merely historical interest, as the experts are agreed that in Malaya the position of a "t'sip" approximates more closely to that of a principal wife or "t'sai". What, however, is quite clear is that divorce was at the will of the husband and still is so. This conception of the marriage bond is traditional among the Chinese, and, particularly in a Mohammedan State like Perak, where under Islamic law a wife can be put away at the will of the husband for no reason whatever, there is nothing contrary to natural justice in giving recognition to such a custom. Among the Chinese resident in Malaya, however, such divorce must not be merely capricious, but should be justified by such definite causes as desertion or misconduct. I am inclined to agree with the learned trial Judge's suggestion that, as under the Roman law, a divorce for insufficient cause is valid but may constitute an offence. It is, however, not necessary to decide this point as the learned Judge has found that the deceased had good grounds for divorcing the plaintiff, and this finding is not challenged.

The learned trial Judge summarises the evidence of Mr. Lim Swee Ho by saying that the gist of it is that divorce must be for a cause and that reasonable notoriety must be given to it. Examining his evidence more closely the witness states "a declaration is necessary to a divorce. Friends and relatives, no particular form. Husband would make a round of visits"; and then in re-examination he adds: "It would not be necessary to make a special visit to inform friends of divorce".

The evidence given before Sir Walter Shaw was to much the same effect. He says, "The custom was that the husband should notify the dissolution either to his near relatives or to his clansmen. It appeared that the dissolution was something like the inception of the union and that no actual ceremony was needed, and it depended upon the actual intention and notoriety given to the union or dissolution", and later he says: "There were several circumstances which seemed to point to the inevitable conclusion that the parties thought that the dissolution was complete".

If I may refer to my own judgment (4 M.L.J. at p. 84), I fully accepted the reasoning of Sir Walter Shaw in the case cited, and after reviewing the evidence in the case before me, I said "It does prove a definite intention to break off the relationship, which was communicated to her and which, by her subsequent conduct, she accepted".

The Court, therefore, has to be satisfied as to the intention of the parties. The declaration of the husband to which Mr. Lim Swee Ho refers, is generally necessary for the purpose of providing substantive evidence that such intention was present. If, however, it can be proved, as it was proved in both of the Singapore cases, and as I think was proved in the present case, that the wife fully accepted the position that she had been put away, that surely is equally cogent evidence of the husband's intention. In such cases only slight evidence that the husband published the fact to friends and relatives would appear to be necessary.

In examining the evidence given before the learned trial Judge it is to be observed that he found the evidence of the plaintiff to be quite valueless, and I see no reason for not accepting the learned Judge's conclusions on this point. Evidence was also given by four of the surviving widows of the deceased who were defendants. The learned Judge states that he does not think that any reliance can be placed on their evidence on the ground that they were interested and obviously vindictive. This finding is challenged by counsel for the appellants, who argued that parties to a civil suit are frequently interested but that this is not a sufficient ground for rejecting their evidence. He also argued that there was no evidence on the record of these witnesses being in any way vindictive. However that may be, it must have been obvious to these widows that the plaintiff had permanently left her husband's protection, and in view of the other evidence it is, I think, unnecessary to rely on the evidence of the widows to establish the intentions of the deceased in connection with the severance of the marital relations.

It was clearly established that the plaintiff left the house of the deceased in March, 1936, and never returned to her husband's protection. It may also be presumed from the rejection of the plaintiff's evidence that she was never maintained by her husband after she had left and that he never visited her. The evidence to the contrary is not accepted by the learned trial Judge. It is also established that the plaintiff gave birth to a child at Kampar in July 1937. The birth certificate of the Kampar Chinese Public Maternity Hospital (Exhibit C) gives the name of the father as Yap Swee (the deceased's name) but describes him as a mining cooly. This certificate is dated 7th July, 1937, the date of the birth. In the Register of Births and Deaths (Exhibits D and E) the name of the child is given as Yap Hooi Kiaw and the father

as Yap Sam, said to be dead. The mother's name is given as Chan Lim and the plaintiff states that that was the name given to her by her mother when she was a child. The report to the Registrar of Births was made by plaintiff's mother who was not called as a witness. The learned Judge, therefore, had ample ground for disbelieving plaintiff's statement that the deceased was the father of the child.

An important witness was Wong Fatt, Detective No. 79 at Lahat. He was acquainted with the plaintiff and her mother and knew of the marriage of the plaintiff to the deceased. He states, "I met plaintiff in Kampar at end of 1936. I knew her in Kampar. She often visited my wife. I heard her say she had divorced from Yap Swee". This witness appeared to be an independent witness although subsequently he was employed by the deceased to watch the plaintiff. He was called by the defendants who gave their evidence before that of the plaintiff. The only reason given by the learned Judge for rejecting this evidence is that the plaintiff was not asked about it. In this matter the learned Judge would appear to have misdirected himself. It was for the plaintiff to deny the statement and not for the defendants to cross-examine her upon it. The statement therefore is unchallenged, and no adequate reason has been given for disregarding it.

Then again it was established that the plaintiff never attended the deceased's funeral. Mr. Lim Swee Ho is quite definite as to the effect of her failure to attend. He says:

> "Duties of t'sip at husband's funeral, to wear mourning, and attend funeral. If she does not she is not recognized".

The witness was cross-examined as to the necessity for attendance at the funeral and stated that if a t'sip were ill she would mourn in the house.

The plaintiff never said that she had attended the funeral or was too ill to attend. The only suggestion that she attended the funeral is an uncorroborated statement by Yap Yet Ming, a child of the plaintiff and 10 years of age, and she merely states that she went to the place where her father was buried on the day of the funeral. It seems that the plaintiff did not appear in the group photograph taken at the funeral (evidence of Wong Yuk Lan p. 47 of record) and it may be taken as quite certain that she was not there.

So far as the plaintiff is concerned the following facts appear to have been established:

(1) she left the deceased in March, 1936, and refused to return. Up to the time of deceased's death in February, 1937, she never again resided with him;

(2) the deceased never maintained or visited her and she never made any claim for maintenance;

(3) at the end of 1936 she told Wong Fatt that she had been divorced;

(4) in 1937 she had a child by another man;

(5) she never attended the funeral.

On this evidence it seems clear that the plaintiff fully recognized that she had been "put away" or "divorced".

It appears to me that when once it has been established that the husband's intention to divorce her had been communicated to the wife and that she had accepted the position, the necessity of proving the husband's intention by statements made by him to others becomes of secondary importance, and that it will be sufficient if there is some evidence that the fact of the divorce was not concealed, and that some people in close relation to the husband were informed. It must be remembered that according to Mr. Lim Swee Ho no particular form of declaration is necessary, neither to make a special visit to inform friends of the divorce. I take this to mean that the fact of the divorce must not be concealed, but that it will be sufficient if the husband informs friends and relatives when he meets them. There is a considerable body of evidence, in addition to that of the four widows, that he in fact did so. Sahat bin Baked, the deceased's Malay motor-car driver, was sent to the plaintiff's house by the deceased to fetch the plaintiff back immediately after she had gone away. He was unsuccessful and informed the deceased who replied "if the woman does not want to come to Menglembu I do not want her". Low Choong Sang, an insurance agent and a friend of the deceased, says that the deceased told him that the woman had gone away, that he did not want her, he only wanted the children.

You Kam, manager of a foundry in Menglembu and a friend of the deceased of 20 years' standing. He said that the deceased had told him that he had severed relations with the plaintiff "same as divorce", not long after she ran away. In cross-examination he said, "He said he did not want her. That is what I took to mean divorce". It may be, as suggested by counsel, that the latter sentence was the interpreter's explanation. If the expression "I do not want my wife", when used by a Chinese husband in connection with a t'sip, means the same thing as "I have divorced her", then the statements of Sahat and Low Choong Sang, which at first sight might appear equivocal, obtain a greater significance. Lastly there is the evidence of Loh Mook Lim, the father of Loh Kim

Keow one of the deceased's widows. He says that the deceased told him that after the plaintiff had left Menglembu he had divorced her. "Word used was *'lie fan'* a technical word meaning dissolution of marriage", and later he says "I asked him 'why *lie fan*?' Deceased said because she wanted to live in Ipoh and refused to live in Menglembu".

Then there is the statement made by the deceased before the Protector of Chinese on the 3rd June, 1938, when he was trying to get his children back. The statement commences "Ng Yoon Thai (the plaintiff) was until she left me in March, 1936, my fourth wife" and towards the end of the statement (p. 102 of the record) he says:

> "She wanted to live away from the house, i.e., she wanted me to provide a separate place of abode for her and separate maintenance. I declined to agree and she wanted separation to which I agreed".

Now I think it is quite certain that "separation" does not mean separation of the character of a judicial separation under the Divorce Acts. There is no such status by Chinese custom. "Separation" in this context can only mean severance of the marital relation and is equivalent to divorce.

It is now necessary to consider how the learned trial Judge deals with this positive evidence. He rejects the evidence of Loh Mook Lim in a paragraph (p. 126 of the record) which is somewhat *obscure*. I take it, however, that he considered that the evidence of Loh Mook Lim must be prejudiced because he was the father of one of the widows, the fifth defendant. He disregards the evidence of You Kam because the statement made to him by the deceased was apparently in answer to a question and not volunteered and was ambiguous in character. He gives no ground, however, for doubting the truth of You Kam's evidence and if that can be accepted there is no reason for doubting the evidence of Loh Mook Lim. The learned Judge does not refer to the evidence of Sahat and Low Choon Sang, although in my view, their evidence is strongly corroborative of the other two witnesses. Lastly the learned trial Judge explains away the statement made before the Protector of Chinese on the ground that the deceased would be reluctant to admit that a woman who was a prostitute was his wife. I cannot think that this reasoning is sound. It is to my mind quite unthinkable that a Chinese, having information that a wife had become a prostitute, did not immediately take steps to sever the marital relation. The only possible explanation for his not doing so in 1937 or 1938, when he discovered that his wife was "earning money", must be that he had already done so in 1936, and when he says that the plaintiff was his fourth wife until she left him in March, 1936, he definitely implies that after that she ceased to be his wife. I do not think that the fact that the two detectives, in recording the deceased's conversation, make him refer to the plaintiff as "his wife" has any significance. It was merely a convenient way of indicating the woman to whom he was referring.

My conclusion, therefore, is that there is sufficient evidence that the deceased severed his relations with his wife, that is to say, divorced her according to Chinese custom, when she refused to return to him in March, 1936, and that he informed various friends and relations that he had done so, that the fact of such severance was fully recognized by the plaintiff by her conduct, and that this is sufficient to constitute a divorce of a secondary wife according to the custom among Chinese recognized in Perak.

I would accordingly allow the appeal and set aside the order made in the Court below except as to the costs of the defendants, and costs paid to the plaintiff in the Court below should be repaid. The plaintiff-respondent should pay the costs of the appeal but the defendant-appellants should have recourse against the estate for their costs as between solicitor and client. The deposit should be repaid to the appellants or their solicitor. There will be a certificate for two counsel.

Appeal allowed, certificate for two counsel.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J.

May 31, 1940.

LEE YEW AND 46 OTHERS

(Appellants)

vs.

PUBLIC PROSECUTOR

(Respondent).

[PAHANG MAGISTRATE'S CRIMINAL APPEAL No. 9 of 1940]

Common Gaming Houses Enactment—Social Club —Habitually used for gaming, the club deriving a large part of its revenue from gaming—not gaming house— Revisionary powers of Judge exercised.

A Chinese club at Kuala Lipis was raided by the police and they found in one room a game of Mah Jong in progress and also that a game similar to dominoes (Tien Kau) was being played before their arrival; a game of billiards was also in progress. The evidence